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Supreme Court of the United States

OCTOBER TERM 1967

No. 724

ANTHONY MIRRA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Anthony Mirra prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 27, 1967.

Opinions Below

The opinion of the Court of Appeals, printed as Appendix A hereto, *infra*, is reported in 379 F. 2d 782. The opinion of the District Court is reported in 255 F. Supp. 570.*

* In a motion which accompanies this petition we ask leave to dispense with printing the lengthy opinion of the District Court, on the ground of petitioner's financial inability. Nine photocopies of that opinion are filed herewith.

Jurisdiction

The judgment of the Court of Appeals was entered on June 27, 1967 (Appendix B hereto, *infra*). The time for filingthis petition has ben extended by Mr. Justice Harlan to and including October 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

Petitioner moved under 28 U.S.C. §2255 to vacate a 1962 sentence for narcotics conspiracy on the ground of denial of constitutional right in connection with claims that he was mentally incompetent during a part of the 1962 trial. He also moved to disqualify the 1962 trial Judge for the purpose of the §2255 motion, on the ground of "bias and prejudice" (28 U.S.C. §144) and thatthe Judge must be a "material witness" (28 U.S.C. §455). The questions are:

1. Was the denial, *without a hearing*, of the §2255 motion justified here under what appears to be the sole test laid down by §2255— i.e., was such denial justified on the theory that "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief" (28 U.S.C. §2255)?

2. Was such denial justified on the ground of waiver— i.e., on the ground that petitioner did not raise the within §2255 issues concerning mental incompetency in the prior proceedings for direct review of his narcotics conviction?

3. Supplementing question "1", above—Where the §2255 movant has shown in his moving papers that (a) he had a sudden, violent outburst while he was on the stand during his trial, in which he threw the witness chair at the prosecutor with such force that the chair shattered against the jury box; (b) he does not remember this incident or the aftermath period of some hours and suffered continuing partial mental haziness or inability of attentiveness for

the next day or more during which the trial proceeded with the taking of testimony; (c) his court-assigned trial attorney found him inaccessible to effective communication during such relevant time; (d) a contemporaneous application by his court-appointed trial attorney for psychiatric examination was peremptorily denied by the trial Judge on the ground that the Judge was satisfied from his own observations that petitioner was faking any claimed psychiatric symptoms; (e) he was also given medication after his outburst which could have affected his mental alertness; and (f) a qualified psychiatrist has made affidavit in the §2255 papers that petitioner could have had a psychotic interlude at the time in question, that the medical facts could only have been medically-acceptably explored by a contemporaneous psychiatric examination, and that the trial Judge's determination of faking was absolutely of no medical value or weight without the benefit of such a contemporaneous psychiatric examination; and where also neither the Government nor the Court, in the §2255 proceedings on the issue of whether a §2255 hearing should be held, have adduced any psychiatric or other *medical* facts to contradict the opinion of the last-mentioned affidavit; and where the only showing made or other circumstances adduced in opposition to the §2255 motion for a hearing consist of miscellaneous items pointing to unusual troublesomeness during the trial as regards misconduct by various defendants allegedly aimed at disrupting the trial, plus two post-trial incidents in which the within petitioner spoke contritely about the chair throwing outburst, both of which post-trial incidents are entirely consistent with the petitioner's having expressed such contriteness on the basis of after-obtained knowledge on his part (rather than that he lied in claiming contemporaneous amnesia)—where such is the posture of the §2255 motion proceedings on which relief has been denied without a hearing, can it be said that such denial is justified by constitutional due process or by

facts satisfying the evidently sole statutory test of 28 U.S.C. §2255 ("the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief")?

4. As respects the motions for disqualification of the trial Judge for the purposes of the §2255 proceedings, one question is: In the perhaps uniquely emotionalized circumstances of the Federal criminal trial to which the present §2255 motion is addressed, a trial that is probably unexampled for exacerbating tensions affecting the judicial equanimity of the trial Judge himself, is the constitutional due process requirement of "a fair and impartial tribunal" (for the purposes of the §2255 proceeding) satisfactorily met either by the Federal "bias and prejudice" statute itself (28 U. S. C. §144) with its on-the-face standard of "*personal* bias or prejudice", or by the findings of both of the Courts below that the trial Judge did not have such "personal" bias or prejudice or "personal animus"; must not the §2255 *due process* issue of "fair and impartial tribunal" be resolved, rather, on the test of whether the trial record facts as a whole "exhibit a bent of mind fatal to impartiality of judgment" (*Rosen* v. *Sugarman*, 357 F. 2d 794, 798 (C. A. 2, 1966))?

5. Further as respects disqualification of the trial Judge, is it possible at all to justify the rejection (by both of the Courts below) of our contention that, in any event, the "material witness" provision of 28 U. S. C. §455 required disqualification of the trial Judge in that he would inevitably be a "material witness" in a §2255 hearing—*i.e.*, does not the latter statute in any event require such disqualification because in the herein sought §2255 hearing there would inevitably be brought under direct factual challenge as part of the hearing testimony (in which we would surely call the trial Judge as a witness ourselves if the Govern-

ment chose not to do so), the trial record facts of the trial Judge's indisputable and *dispositive* reliance at the trial on his own personal observations and evaluation of petitioner Mirra's conduct as having been faked, in consequence of which observations and evaluation the trial Judge had taken it upon himself (as a medical layman) preemptorily to reject the application for a contemporaneous psychiatric examination?

6. In combination (or singly), do the above questions merit this Court's certiorari intercession for the proper supervisory administration of Federal criminal justice under 28 U. S. C. §2255 and the constitutional (due process) and statutory (28 U. S. C. §§144, 455) requirements as to disqualification of trial Judges in the interests of a fair and rational Federal system for collateral post-conviction reveiw in criminal cases?

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment (due process of law) of the United States Constitution; 28 U. S. C. §§2255, 144 and 455; and 18 U. S. C. §4244. The latter statutes are printed in Appendix C hereto, *infra*.

Statement of the Case*

* A word as to the record materials which we are filing with this petition:— In accordance with amended Rule 21(1), we are filing the certified "record on appeal" which we filed in the Court of Appeals in our appeal from the order denying the §2255 motion without a hearing, together with the certified proceedings in the Court of Appeals. There is one other item which we think should be deemed part of the aforementioned "record on appeal" but which we are unable to file here, namely, an item which the Government filed in the District Court in opposition to our §2255 motion, entitled "Govern-

(Continued on following page)

This §2255 proceeding arises out of petitioner Mirra's 1962 conviction and twenty years sentence for narcotics conspiracy (S. D. N. Y., MacMahon, D.J.). The conviction was affirmed in *United States* v. *Bentvena*, 319 F. 2d 916 (C. A. 2, 1963), cert. denied 375 U. S. 940. Mirra is serving his sentence at Atlanta.

In essence, the ground of the within §2255 motion was that during a part of the 1962 narcotics trial Mirra was not mentally competent to understanding the proceedings against him and to assist in his own defence, and that a request by Mirra's trial attorney for a psychiatric examination was denied in a peremptory ruling of the trial Judge without holding any hearing on said request (R. 1-2*).

(Continued from preceding page)

ment's Appendix, *United States* v. *Anthony Mirra*, 66 Civ. 83", which was treated in both of the Courts below as an exhibit, and which accordingly is not available for filing by us because (we are advised) it is an exhibit in the continuing custody or control of the Government; presumably the Solicitor General will file said exhibit in this Court.

In lieu of an "appendix" we filed in the Court of Appeals four photocopies of the entire "record on appeal" above mentioned. The Clerk of the Court of Appeals has released to us one of those four copies, which we file herewith along with the certified "record on appeal", so that this Court may have available an extra copy of the entire "record on appeal" in the Court below.

See also our motion filed herewith for permission to dispense with printing in this petition the text of the lengthy opinion of the District Court, which has been officially reported (p. 1, *supra*). Nine extra photocopies of that opinion are filed herewith.

* "R.—" refers to the certified "record on appeal" which we filed in the Court below, one extra copy of which is filed herewith.

On June 4, 1962, during the narcotics trial, Mirra suddenly committed an act of phenomenal violence. Mirra was on the stand testifying in his own defence. The prosecutor was asking Mirra about a prior narcotics conviction, when Mirra picked up the witness chair and hurled it at the prosecutor with such force that the chair (after fortunately missing the prosecutor) broke into pieces as it struck the jury box. Mirra was immediately placed under restraint and was taken from the courtroom. After a recess of about two hours the trial resumed, with Mirra under gag and shackles. During the last mentioned recess Mirra's court-appointed counsel, Mr. Luney, informed the Court that Mirra was "incoherent", that "there is no communication between him and his lawyer", and Mr. Luney asked the Court to have Mirra examined by a qualified psychiatrist, to which the Court without further ado responded, "Declined". See R. 29-33.

Over the next two days following the above outburst by Mirra, his trial attorney several times represented to the Court that he could not effectively communicate with his client, and the request for psychiatric examination was renewed without success; during this time of Mirra's claimed mental inability important trial testimony was taken (*infra*).

The happenings summarized in the above two paragraphs form—together with the affidavit (R. 9-17) of the qualified psychiatrist (Dr. Max Helfand) whom we engaged for this §2255 proceeding—the essential subject matter of our factual showing in the within §2255 motion which was denied without a hearing. For the main details of that factual showed we shall now quote the relevant portions of the affidavit of Jerome Lewis, Esq., Mirra's attorney in the §2255 proceeding, after which we shall quote from the psychiatrist's affidavit; the following portion of Mr. Lewis's

affidavit appears at R. 31-53, and it picks up the chronology of the above summarized 1962 trial happenings at the juncture (June 4, 1962) immediately following Mirra's throwing of the chair at the prosecutor:*

> "* * * as Mirra's attorney Mr. Luney approached the bench to apologize for Mirra's action (the Court at once assuring Mr. Luney that 'I am sure you had nothing to do with it') and to request a brief recess to permit him to confer with Mirra (6464), a recess was taken, at 10:30 A.M., which lasted until 12:29 P.M. (6465-6566), whereupon Mr. Luney addressed the Court at the Bench (6466-6467):
>
> 'I intended before to place not only my apology but Mr. Mirra's on the record because, when I observed him, I thought he was not in control of himself. Since that time, during the recess, I have seen him twice. He has been incoherent when I tried to talk to him. The only recurrent phrase that he would use is, "They are trying to murder me," which he said over and over again.
>
> He complained of being sick. I informed the marshal, and a nurse was sent, I understand. I have tried to consult with him during the recess in terms of one, calming him down and, two, talking to him and counseling him as his lawyer, and, your Honor, I just cannot get through to this man now. There is a block there. There is no communication between him and his lawyer, and I respectfully ask the Court to commit Mr. Mirra to Bellevue or whatever appropriate place there is for examination by a qualified psychiatrist.

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* In the following quotation from Mr. Lewis' affidavit, the numbers cited in parentheses refer to pages of the 1962 trial record.

The Court: Declined.

Mr. Luney: Will your Honor consider at all—

The Court: No, no more psychiatric examinations in this case.

Mr. Luney: I can only represent to the Court what I observed his condition to be, and there is just no line of communication between him and his lawyer at all.

The Court: I will permit you to take him from the stand at this time and defer future cross-examination.'

"In this last quoted portion of the trial proceedings of June 4, 1962 I respectfully call attention to the following (a) Mr. Luney, as Mirra's Court appointed attorney solemnly gave the Court detailed information as to his own direct observations of Mirra's mental condition in the two hours following the chair-throwing incident, stating that Mirra was 'incoherent' and complained of being sick; (b) Mr. Luney had found it impossible to communicate with Mirra; (c) Mr. Luney then and there requested a psychiatric examination which the Court peremptorily denied; (d) the Court itself nevertheless suggested that further cross examination of Mirra be deferred, thereby indicating that the Court itself must have realized that Mirra was not or at least might not be in proper mental condition for further cross examination at that juncture.

"Immediately after this the prosecutor, the Court and Mr. Luney discussed a stipulation as to a certain further item on which the prosecutor said he wanted to cross examine Mirra, namely, the date when Mirra commenced serving his sentence under

the prior conviction; Mr. Luney turned to Mirra himself to verify the date; he turned back to the Court after a pause for this purpose and said 'Your Honor, the only response I got is, "I don't know what you mean"' (6467-6468). It was thereupon arranged that the stipulation would be made and the Court agreed to Mr. Luney's suggestion that, upon the making of the stipulation Mirra be withdrawn as a witness and his re-direct examination be deferred 'until a time when he can cooperate in his defense,' the Court however stating that an application for that purpose would have to be made, i.e., an application to recall Mirra for re-direct examination (6469).

"Immediately after this the Jury was brought back in, the stipulation as to the date of commencement of Mirra's prior sentence was announced to the Jury, there was then a 'very very short recess' during which the Court ordered Mirra put back in his chair with shackles and gag, at which Mirra said 'Why are you going to gag me for?' (6470-6472).

"A few moments later (still June 4, 1962) Ernest Drolet, a witness for one of the co-defendants was called to the stand; Drolet's testimony was important on the issue of the credibility of Suzanne Cadieux, who was one of the two witnesses against Mirra, the other one being Edward Lawton Smith. Drolet's direct testimony was given at 6473-6484, at the conclusion of which the Court called the luncheon recess and instructed Mr. Luney to confer with Mirra during the recess to ascertain whether Mirra wanted cross examination of Drolet (6484). At the commencement of the afternoon ses-

sion (June 4, 1962) at 2:28 P.M., which was about four hours after the chair-throwing incident, Mr. Luney informed the Court that he had followed the Court's request to consult with Mirra regarding cross examination of the witness Drolet, and 'I attempted to and I had no response other than Mr. Mirra said he had a headache. He appeared to be asleep most of the noon hour and I frankly got no response of yes or no that I can convey to the Court', to which the Court responded, 'Ask him now. He is not asleep now', and after a pause for this purpose Mr. Luney told the Court 'There is no response at all that I can report' (6486-6487).

"Immediately after this the Government cross examined Drolet (6487-6491), and thereafter two of the defense attorneys (not Mr. Luney) further questioned Drolet (6491-6493), all of which used up approximately another eighteen to twenty minutes (see 6494, 6496); and then at that juncture (i.e., at the conclusion of all of the questioning of Drolet), the Court again invited Mr. Luney to consult with Mirra, Mr. Luney stated 'I can say only that I have endeavored to consult with him; without success', to which the Court replied 'If he doesn't want to cooperate with you, that is his tough luck', Mr. Luney then stated 'I observed him to be asleep during the last proceedings', and the Court said 'He is not asleep. He is wide awake' (6495-6496). The Court then permitted Mr. Luney to have Mirra taken outside the courtroom for a consultation with the gag removed; this was at 2:48 P.M.; they returned to the courtroom at 2:54 P.M., whereupon the following occurred (6496-6497):

'Mr. Luney: I spoke to my client after we left the courtroom. He said almost nothing at all.

But let me say first, your Honor, he appeared to be sleepy and he was—

The Court: Oh, cut it out, Mr. Luney. Your duty to your client doesn't go this far. This is a put up job if I ever saw one.

Mr. Luney: Your Honor, I am telling you what I saw. I have a duty to do that.

The Court: He can fake sleep with you as well as he can with anyone else.

Mr. Luney: May I say what I saw, sir? He appeared to be sleepy and he was weaving when he stood. The marshal took him over and sat him down. I asked him if he had gotten any medication, and I got out of him that the nurse, who had seen him during the noon recess, had given him two pills. I asked him what they were, and he didn't know.

I went downstairs to the marshal's phone and called Nurse Block, and asked her if she had given him any medication during the noon recess. She said she had given him a half grain of phenobarbital in two tablets. At that point I came here to report what I had seen to your Honor.

The Court: All right, we will proceed.'

A few minutes later (2:57 P.M.) Mr. Luney told the Court that he had just been outside the courtroom to see where Mirra was and 'the marshal just informed me that he is asleep and they can't wake him up'; the Court said to the deputy marshal 'Wake him up. Bring him out here', and the record then states that Mirra then returned to the courtroom (at 2:58 P.M.); thereupon the Court

asked Mr. Luney if he had any cross examination of the witness Drolet; and Mr. Luney replied 'I have been unable to determine from my client what his wishes are', adding that on his part alone, without consulting Mirra, he had no cross examination of that witness (6498-6499).

"Immediately after this (still June 4, 1962) one of the other defendants called to the stand a second French-Canadian witness, Simone Nadeau, in order to develop further the issue as to the credibility of the witness Suzanne Cadieux (who, as above stated, had been one of the two witnesses who had inculpated Mirra in this trial) (6500-6508). At the conclusion of this Nadeau direct examination, the Court directed Mr. Luney to consult with Mirra as to whether he wanted Nadeau further questioned, and Mr. Luney, after a pause, stated, 'I have attempted to consult with him, Your Honor, and I got no answer. I can only say again on my part, after discussion with counsel who called this witness without Mr. Mirra's consultation, I have no questions myself' (6508-6509).

"Immediately after this, it being now 3:25 P.M., the Jury left the courtroom and the Court said 'Take Mirra out, too. Throw some cold water on him, good cold water', and at 3:26 P.M. Mr. Luney and Mirra left the courtroom (6509-6510).

"A recess was then taken from 3:30 P.M. to 3:45 P.M., and the Court then again asked Mr. Luney if he had any cross examination of the witness Nadeau, to which Mr. Luney replied, 'I consulted with my client during the recess. He seemed wide awake. He said the marshal had given him cold water. I asked him if he desired any cross. He said he

couldn't remember the witness or what she had said', and Mr. Luney added that for his own part he did not have any cross examination of Nadeau (6510-6511).

"The immediate next development in the trial was the taking of the testimony of two witnesses who were called by the Mirra defense and who, Mr. Luney informed the Court, had to leave New York that evening, so that their testimony must be taken at that time (6512). The first of these witnesses, John Marino, was called by the Mirra defense on an important phase of the issues as to Mirra's activities in the nightclub business during the year 1958, when Mirra is alleged to have committed significant narcotics activity charged in this indictment (6512-6514). After a short further examination of Marino by another defendant (6514-6516), the Court directed Mr. Luney to consult with Mirra as to further questioning of Marino, and Mr. Luney stated that 'I consulted with my client and I got no response. However, I called this witness and I have nothing further' (6516-6517). Thus it appears that despite the cold water therapy prescribed by the Court which had awakened Mirra a short time before, he was evidently again mentally incapable of attentiveness to the proceedings during the questioning of his own witness Marino.

"The second witness called by the Mirra defense at the juncture above mentioned was Murray Moskowitz, who was called for the important purpose of substantiating Mirra's claim that his dealings with Edward Lawton Smith had revolved around Smith's being employed by Mirra in a nightclub job rother than involving any narcotics activity (6517-

6523). Shortly after this Moskowitz testimony, the time now being 4:12 P.M. (still June 4, 1962), Mr. Luney requested and was denied permission to have Mirra taken out of the courtroom, presumably for the purpose of conferring with him as to further questioning of Moskowitz (6524-6525). The record does not indicate whether at this juncture Mirra was capable of attentiveness (6517-6526), although, as above noted, Mr. Luney had got no response from Mirra in a consultation immediately preceding the Moskowitz testimony (6517).

"The next witness—I am here still reciting the trial chronology of June 4, 1962, the day of Mirra's chair-throwing—was Paul A. Osborne, a handwriting expert, called on behalf of two other defendants to testify concerning Smith's credibility in connection with certain documents (6532-6544). At the conclusion of Osborne's direct testimony the Court dismissed the Jury for the day and announced that it would entertain applications from counsel at 5:30 that afternoon (6544-6545).

"The application which Mr. Luney made at 5:30 that afternoon included the following (6546-6550):

> 'Mr. Luney: If your Honor please, I move for a mistrial and the withdrawal of a juror on the grounds that Mr. Mirra during the proceedings today was unable to consult with his counsel. I do so independently of the fact that your Honor ordered Mr. Mirra gagged in the courtroom. I do so on three grounds: After the incident of this morning, I attempted to communicate with Mr. Mirra and I informed the Court at the bench of his response to me, and I will not repeat it. It was impossible to consult with him at all at that time.

I asked at that time for psychiatric examination which the Court denied. I felt it was essential at that time to be able to consult with him in some coherent fashion.

I further move for a mistrial and again independently of your Honor's order of the gagging of the defendant Mirra.

The Court: Let us take the first one.

The Court denies your motion for a mistrial. It also denies your motion for psychiatric examination. This Court has observed this defendant Mirra since sometime in the middle of March of this year. He has been coherent, rational, sane throughout the pretrial proceedings, at which I appointed counsel, namely you, Mr. Luney. He has been rational throughout this trial. There isn't a thing in his background which in any way would indicate anything to the contrary.

I have observed him confer and consult with you every single day up to this point. He took the witness stand against your advice, fully understanding what the consequences might be. I warned him here that he did not have to take the stand, that he had a right not to do so and so on.

He was perfectly rational at all times. His behavior this morning here was wilful and deliberate, designed to provoke a mistrial or terrorize this jury or the Court. His behavior after that in the courtroom was such that he was alert when he wanted to be and feigned sleep most of the afternoon.

At the time you complained he was sleeping, the Court observed that there were seven other defendants with their eyes closed and three defense attorneys. So I decline to give him any psychiatric examination on the ground there is no basis whatever for doing so. His behavior was designed solely to cause delay in this trial.

Mr. Luney: May I say, your Honor, my motion related only to the events subsequent. I am in complete accord with your statement that Mirra cooperated with me throughout this trial until this morning. It was impossible after that incident to confer with him in his then present condition. My motion relates only to that fact.

The Court: I am taking his then self-induced condition into account, and deny it.

Mr. Luney: Very well, sir.

I must further move for a mistrial on the ground that he was deprived of an opportunity to consult with his counsel. I can say only what I observed as I did at the bench. I do not intend to burden the record with my observations, except where I feel they are relevant, and I must present them in my client's defense. I observed Mr. Mirra to be asleep. I was informed by the marshal on one occasion this afternoon that he appeared to him to be asleep in the room behind the courtroom. I have already advised the Court of the attempt I made to verify whether or not that condition of sleep, if it existed, was induced at all by medicine. The nurse, whose name I placed on the record before—

The Court: You have already stated these facts, Mr. Luney. I deny your motion for a mistrial and I will state for the record that in my observation of him what you say is not so. He had his eyes closed at various times, as did other defendants, and he as they was awake and alert many other times. Throughout most of the time that the witnesses were testifying, your back was to Mirra and you were facing the witnesses. I was not, I could see him.

Mr. Luney: Finally, your Honor, I make the same motion on the grounds that during the direct testimony of Mr. Moskowitz I asked the Court for an opportunity to confer with Mr. Mirra and it was denied at that point. I am not in a position, frankly, to say whether it would have been possible to confer with him when I asked the Court about it, but I must bring it to the Court's attention.

The Court: Denied.

Mr. Luney: May I inquire of the Court whether I will be permitted—and I do not intend to prolong this, but I must make this request—to make either a proffer of proof or call this nurse on the voir dire to determine what medication was given to him, because, when I talked to her, she said he had received sedatives, and my obligation is not to let it rest there. I must make the request, and I do so.

The Court: The Court will reserve on that.'

"At the resumption of the trial on the morning of June 5, 1962 (6565), the Court announced its denial of Mr. Luney's above-quoted application of the

previous afternoon to conduct a voir dire as to medication given to Mirra following his throwing of the chair; Mr. Luney noted that he had already informed the Court at the Bench as to the information he had received by telephone from the nurse, and he said 'I submit that as a proffer of proof', to which the Court replied that it would consider a renewal of the motion after the trial and before sentence, if any (6566).

"The handwriting expert witness Osborne then returned to the stand, it now being 10:37 A.M. (June 5, 1962); his testimony appears at 6570-6588 (including considerable colloquy at the Bench). It was now 11:15 A.M., and the record indicates that Mr. Luney consulted with Mirra, there being no indication, however, as to the effectiveness of the consultation (6588-6589).

"Incidentally, during all of these incidents at the trial in the afternoon of June 4, and the morning of June 5, 1962 Mirra remained gagged and shackled in the courtroom.

"The next witness (shortly after 11:20 A.M. on June 5 (6589-6591) was Camille Gellman, called by two other defendants (6591-6594); it appears that this testimony had at least some tangential bearing on Mirra's part in the case. At the end of Mrs. Gellman's testimony Mr. Luney told the Court 'I have consulted, and I have no cross' (6594). The Government then cross examined Mrs. Gellman (6595-6596), and thereafter Mr. Luney again told the Court that he had consulted, and that he had no re-direct examination (6596).

"The next witness was Mrs. Gellman's mother, Angelina Langellotti (6600-6602). Following this

testimony Mr. Luney and Mirra left the courtroom for consultation, and thereafter, at 12:05 P.M. or 12:03 P.M. the Court asked Mr. Luney whether he had had an opportunity to consult with Mirra, Mr. Luney said 'yes', the Court said 'If he doesn't choose to cooperate with you that is his tough luck' (6603), and then the following ensued (6603-6604):

'Mr. Luney: He told me I should inform the Court that he is in a fog, those were his words; he said he received further medication this morning at West Street. He does not know the nature of it. He received three pills. I asked him specifically if he wanted any cross-examination of this witness. I advised him that I wanted none. He said he hadn't heard her evidence, he was in a fog. I have an obligation to place that on the record.

The Court: I observed Mirra throughout her testimony. He is not in a fog. It is a put-up act if I ever saw one.'

"The next witness (still June 5, 1962, a few minutes after the noon hour—6604) was Nancy ('Chickie') James, called by the Mirra defense (6605-6616); Miss James was further examined by other defendants at 6617-6621, and by the Government at 6624-6628. At 6629, in connection with the question of re-direct examination by the Mirra defense of this important witness who was directly involved in many of the most crucial happenings between Mirra and Edward Lawton Smith, Mr. Luney told the Court that although he had had an opportunity to consult with Mirra 'I had no response from Mr. Mirra'. Miss James was then examined on re-direct by another defendant (6620-6634), and the Court then called a luncheon recess until 2:15 P.M. (6634).

"In the afternoon session of June 5, 1962 (2:15 P.M.—6641) the first witness was Frieda Singer, called by the Mirra defense to testify about her relations with Smith and Mirra, which the Mirra defense deemed important for its bearing on Smith's motives to give false evidence against Mirra; Miss Singer had been married to Smith and employed by Mirra in his nightclub business (6641-6648). Miss Singer was further examined by other defendants at 6648-6650, after which Mr. Luney again told the Court that he had consulted with Mirra 'and I have had no response' (6651). The Government then cross examined Miss Singer (6652-6656), and Mr. Luney took a short re-direct examination (6656); a few moments later the Court said 'Let the record reflect that [Mirra] had an opportunity to confer with his attorney (6658).

"The next witness (June 5, 1962) was Jack Gellman, called by another defendant on the subject of various dealings or alleged dealings with Smith which related to Smith's credibility (6658-6680). At 6682 Mr. Luney stated that he had no questions of this witness. The Government cross examined Gellman at 6683-6706, another defendant examined Gellman on re-direct at 6706-6707, and at 6707 Mr. Luney stated 'I have no questions', after evidently having consulted with Mirra.

"Similarly, in connection with the examination of Frank Patuto (shortly after 4:12 P.M., June 5, 1962—6708), called by another defendant (6709-6723), Mr. Luney stated that he had no questions, apparently after having consulted with Mirra (6724). Likewise, in connection with the examination of co-defendant Sciremammano, who took the

stand in his own defense (6725-6732), Mr. Luney stated that he had no questions (6732-6733), and a moment later (it now being 4:50 P.M., June 5, 1962—6733), Mr. Luney informed the Court that Mirra had just asked him for additional consultation; at that point the Court adjourned the trial until the following morning (6733). Counsel and the Court remained in the courtroom for applications, etc., and at 6741-6743 Mr. Luney requested and obtained permission to consult together with Mirra and prospective witnesses that evening—indicating that by this time Mirra was apparently recovering from his previous condition of mental fogginess—it now being, again, the end of the afternoon session of June 5, 1962, which was some thirty hours after Mirra's chair-throwing incident of the previous day.

"At 6744-6747, near the end of the trial day on June 5, 1962, when Mr. Luney asked the Court to grant certain alleviations in regard to the shackling and gagging of Mirra in order to facilitate his consultations with the client, the Court at 6745 made a very strong statement reiterating its firm belief that Mirra's conduct had been willful and deliberate.

"As earlier mentioned, the Jury returned its verdict, including conviction of Mirra for narcotics conspiracy, on June 25, 1962. The next day the Court, acting under the summary procedures of Rule 42-(a), F.R.Cr.P., sentenced several of the defendants, including Mirra, for contempt of court; the Mirra contempt proceeding appears at 9084-9100. In extenuation of Mirra's chair-throwing, Mr. Luney stated that it was his own honest opinion that Mirra had not planned this in advance and was not in

control of himself (9096-9098). When the Court asked Mirra if he had anything to say in his behalf on the contempt charges, Mirra said 'Nothing much, Your Honor, except that I am a hot-head, period'. (9098). The Court sentenced Mirra to one year for contempt, with words of strong denunciation for his conduct (9099-9100).

"On July 9, 1962, after verdict and before sentence, Mr. Luney renewed his motion for a voir dire regarding the question of medication given to Mirra on June 4, 1962 (9198 et seq., re-numbered on appeal as 11911 et seq.). In that voir dire Mary C. Block, employed by the Government as nurse in charge of the first aid room at the United States Courthouse, Foley Square, New York, N. Y., testified that on June 4, 1962 she administered to Mirra one-half grain of phenobarbital (9201-9292, renumbered as 11914-11915). Dr. Anthony J. Ruggiero, a physician engaged by the Government to attend inmates at the Federal House of Detention on West Street was questioned as to the effect which this quantity of phenobarbital would have had on Mirra as regards his ability to confer with counsel and to understand the nature of the proceedings in the trial and to understand the testimony (9204 et seq., re-numbered as 11917 et seq.). Dr. Ruggiero, answering over defense objection, gave it as his opinion that one-half grain of phenobarbital 'should not obstruct a person from understanding and being able to converse' (9206, re-numbered as 11919). On cross examination by Mr. Luney Dr. Ruggiero stated that he had vaguely heard something about Mirra's having 'been upset and had thrown a chair, or something like that. Is that correct?', and that he did not see the happening, nor

had he seen Mirra at any time on June 4, 1962 (9207, re-numbered as 11920). The Court itself pointed out that it was 'quite obvious that [Dr. Ruggiero] has no personal knowledge. We are putting it to him hypothetically based on the record' (9208, re-numbered as 11921). The Court sustained an objection by the Government to a question to the doctor whether, assuming Mirra was more than normally sensitive to phenobarbital, a half-grain would have a more pronounced effect on him in inducing sleep, the doctor having stated that the average hospital dose of phenobarbital given as a hypnotic is a grain and a half (9210, 9212, re-numbered as 11923, 11925). When asked if it is possible that a half grain could induce sleep, depending upon the circumstances and the sensitivity of the person involved, Dr. Ruggiero inconclusively answered 'My impression is no' (9214, re-numbered as 11927). Mirra took the stand in this voir dire proceeding and testified that for some hours over the course of the day on June 4, 1962 after he received the pills from nurse Block he was drowsy or asleep from time to time and that he heard some and did not hear other parts of the proceedings in Court (9221-9225, re-numbered as 11934-11938). At the end of the voir dire the Court stated that it put 'no credence whatever in anything' Mirra had testified to, 'It is rank perjury. It was obvious to the Court in the afternoon involved that he was faking'; and the Court found that there was no interference with Mirra's ability to stand trial and comprehend the nature of the proceedings (9225-9226, re-numbered as 11938-11939).

"I respectfully note that this entire voir dire proceeding of July 9, 1962 was limited to the subject

of the effects of the medication of June 4, 1962 upon Mirra, i.e., it did not produce any testimony on the issue of Mirra's psychiatric condition aside from the medication aspect.

"In Mirra's own affidavit filed herewith he avers that for many days and perhaps some weeks previous to the chair-throwing incident he had been having headaches and nervous tensions and had been feeling quarrelsome. Mirra personally told me substantially these same facts at the West Street Detention quarters in 1964. The medical records which I have received from the Federal Bureau of Prisons, and which I am prepared to introduce in evidence at a hearing in this '2255' proceeding if such be granted, contain, among others, entries showing that Mirra while in prison during and shortly preceding the trial before Judge MacMahon in 1962 was evidently suffering from recurrent or chronic nervous troubles, and that he was receiving sedation and medication for pain. Thus, on March 8 and March 9, 1962 he was twice administered Darvan, which I am advised is a medication for pain. On March 20, 1962 there is an entry 'Doriden for sedation', and there are further entries for Doriden at '10 P.M.' in the evening on March 27 and April 2, 1962, indicating that these sedatives were for sleep. On April 3, 1962, 7 P.M., there is an entry reading 'May have Benedryl 100 mg for a few nights, per Dr. Ruggiero telephone call' and on April 7, 1962, at 10:20 P.M. there is an entry 'Benedryl * * * 100 mg, thereafter to report before 10 P.M.'. On April 8, 1962 there is an entry that Mirra 'requires no sedation this evening (Benedryl)', and on April 10, 1962 there is an entry 'Discontinue sedation medication per Dr. Ruggiero, may

have phenergan 2 tablets two nights'. Phenergan was given again the next night, then on April 18, 1962, 10 P.M. there is again the entry 'Doriden for sedation'. Again on May 21, 1962, 9 P.M., Mirra was given Doriden. On May 28 through June 1, 1962 there are entries 'Emprozil for court'. On June 2, 1962, 6 P.M., which was during the week-end between the commencement of Mirra's cross examination and its resumption on June 4 (the chair-throwing day), there is an undecipherable entry signed 'Hall', which we shall endeavor to elucidate at the hearing on this motion if such is granted. On June 4, 1962, 7:30 P.M. there is another undecipherable entry signed 'Bell' which we shall also try to elucidate. On June 5, 1962, 9 A.M., the morning after the chair-throwing day, there is a partially illegible entry in which the word 'Thorazine' is readable, '75 mg', plus the entry 'patient seems agitated and apprehensive at this time, complains of nervousness and headache'. That same night, June 5, 1962, 8 P.M. Mirra got 'Doriden 0.25'. On June 6, 1962, 9 A.M., there is an entry which looks like 'Ritalin', one tablet 'now' and one tablet 'for court'. That same night, 7:30 P.M., Mirra again got 'Doriden 0.25' and at 10 P.M. that same night he got 'Doriden 0.5'. On June 8, 1962, at 6 P.M., Mirra got 'Fiorinal'. On June 11, 1962, 8:30 A.M., he again got Emprozil. On June 12, 1962, 8:30 A.M., he got 'Emprozil tablet now and tablet for court' and he also got kaolinpectate (a familiar medication for diarrhea). On June 13, 1962, 8:30 A.M. he again got 'Emprozil tablet now and tablet [or two tablets] for court'; that same night, 10 P.M., he got 'Equinol', a well-known 'tranquilizer'. On June 14, 9 A.M., he got Emprozil, and at 10 P.M. he was back again on Doriden.

"I am informed that all of the above mentioned medications, except the Darvan for pain and the kaolinpectate for diarrhea, are or may be used for sedative purposes. If a hearing is granted in this '2255' motion I shall endeavor to develop the full medical details of the administering of this medication to Mirra in the period preceding and shortly following his outburst of June 4, 1962, with a view to showing that the medical picture is consistent with a condition of sustained psychological and nervous strain as averred by Mirra in his affidavit filed herewith."

The affidavit of the qualified psychiatrist, Dr. Max Helfand, whom we engaged for this §2255 motion, stated in part as follows (R. 11-17):

"From the above documents and information I conclude that Anthony Mirra, during the stage of his life which included the Courtroom happenings of June 4, 1962 and the immediate aftermath period was a Sociopathic Personality, formerly referred to in the terminology of my profession as Psychopathic Personality, and that as such he might have been subject to outbursts of temporary psychotic episodes which would be or might be characterized by exrtme hostility and outbursts of sadistic behavior. I have further concluded that, without a full psychiatric examination having been made immediately or very shortly after Mirra's Courtroom outburst of June 4, 1962 no legally proper conclusion from a sound medical standpoint could be made as to Mirra's fitness to stand trial after that outburst, or indeed for a time preceding the outburst whose duration could only have been determined by such a prompt psychiatric examination. I fur-

ther hereby state that if such a psychiatric examination had been conducted the conclusion might well have been that Mirra was not mentally fit to stand trial; in other words, that from a psychiatric standpoint there is definitely sufficient indication of psychological disturbance and of psychotic propensity to justify my present evaluation that a psychiatric examination may well have required the conclusion that Mirra was not fit to stand trial.

"In arriving at the conclusions and opinions stated in my above paragraph I have taken into consideration the following from the previously mentioned documents and information supplied to me by Mr. Lewis:

"(a) That Mirra, when under tension during an acute stage of his own cross examination by the Prosecutor in the narcotics trial on June 4, 1962, showed extremely violent behavior consisting of his picking up and throwing the witness chair at the Prosecutor with such force that the chair was partially smashed when it struck the jury box.

"(b) That immediately or within a very short time after this outburst a Government nurse at the Courthouse administered Phenobarbitol (one-half grain) to Mirra, that she evidently administered this medication on her own responsibility, that is without direction from a physician, and that since the records which I have seen do not reveal anything as to what objective evidence of medical emergency the nurse herself considered in administering this medication, there is an open question at this time from a medical standpoint as to just what was Mirra's psychiatric condition at that juncture.

"(c) That the statements which I have read in the record in which the Trial Judge voiced the conclusion that Mirra had deliberately staged his outburst in order to disrupt the trial and that afterwards Mirra was faking sleep or drowsiness or inability of attentiveness, raise a question of reconcilability with the above mentioned action of the nurse in administering medication on an apparent observation by her of a medical need therefor; these expressions of the Trial Judge are also difficult to reconcile with an item which I read in the record to the effect that the Judge had ordered the Marshal to pour cold water on Mirra; that is, without the full exploration which would have been possible in a contemporaneous psychiatric examination, the reconciliation of these items and a sound medical determination of whether Mirra was faking presents a question of serious medical difficulty.

"(d) That Mirra's court-assigned attorney in the trial, Mr. Luney, several times advised the Court after Mirra's outburst on June 4, 1962 that he (Mr. Luney) could not communicate with Mirra. Mirra's outburst occurred shortly before 10:30 A.M. (Tr. pp. 6455-6465). At about 12:30 P.M. Mr. Luney told the Court he had seen Mirra twice during a recess following the outburst and 'He has been incoherent when I tried to talk to him. The only recurrent phrase that he would use is, "They are trying to murder me", which he said over and over again. * * * I just cannot get through to this man now. There is a block there. There is no communication between him and his lawyer * * *' (Tr. pp. 6466-6467). Mr. Luney went on, at the stage just mentioned, and several times over the rest of that day, to inform the Court that he could not get any

response from Mirra, could not get through to Mirra's mind, that Mirra appeared to be in a condition of stupor or withdrawal, etc. I am informed that the complete record page references for these items which I have read are given in the affidavit of Mr. Lewis.

"(e) That, aside from my above recitals concerning the Trial Judge's view that Mirra was faking, I unequivocally hereby add that to me as a psychiatrist, these expressions by a medical layman could not then and cannot now be of assistance in making a medical determination of Mirra's condition at the time, since the Trial Judge's expressions are stated in the record merely as conclusions without supporting facts. The opposite hypothesis, that Mirra was not faking, is consistent with all of the facts which have come to my attention in this matter and the salient items of which I am setting forth in this affidavit.

"(f) That in the hearing on Mirra's motion which was held after verdict and before sentence the physician whom the Government called as a witness, Dr. Anthony J. Ruggiero, testified only as to the effect of the medication administered to Mirra by the nurse on June 4, 1962, and did not testify concerning any psychiatric evaluation of Mirra, or of Mirra's conduct in the outburst or its aftermath incidents.

"(g) That Mirra's court-assigned trial attorney, Mr. Luney, also informed the Trial Judge, shortly after Mirra's outburst on June 4, 1962 when Mirra kept saying 'They are trying to murder me', that he complained of being sick.

"(h) That Mirra personally informed Mr. Lewis in their recent conferences for the preparation of the §2255 motion, and Mr. Lewis has so informed me, that Mirra did not then have and never did have any recollection of having thrown a chair in the Courtroom, or of the happening of the outburst, or of anything going on around him or of what his own state of mind was, that he has no recollection of being aware of anything from a time in his cross examination just shortly preceding the outburst until some hours thereafter, and that his memory of the remainder of that day is very vague; and that his memory of the following day is clearer but still vague; also that while he was on the stand prior to the outburst he had a feeling of being 'needled' by one or more of the Government agents who were in the Courtroom.

"(i) That Mr. Lewis has informed me also, from his knowledge of the trial record as a whole and of the record of a prior trial in this same case, that Mirra had engaged in generally erratic behavior in both trials and had been held in contempt in the first trial (as well as in the second trial).

"(j) That Mr. Lewis has also informed me that Mirra told him about one year ago and again more recently that for a period of perhaps several weeks prior to the outburst of June 4, 1962 Mirra had virtually constant headaches and tensions, and felt quarrelsome.

"(k) That in childhood, around age nine or ten to eleven or twelve, Mirra had two head injuries, one when he ran into a wall while playing baseball in school, injuring his head near the left eye, he was taken to Beekman Downtown Hospital, the

wound required nine stitches and there is a scar; and the other accident was an injury to the back of his head, behind the right ear when he was roller skating on one skate holding the other skate in his hand, he fell and hit his head with the latter skate, and the wound took four or five stitches.

"(l) That in 1943 or 1944 Mirra was rejected by the United States Maritime Service in New York City, the lower Broadway office, as emotionally unstable.'

In support of the §2255 motion we also filed an affidavit by the prisoner (petitioner Mirra) (R. 3-8), the essential averments thereof having been sufficiently touched upon in the above quotations from the affidavits of Mr. Lewis and Dr. Helfand, except that note may here be made of Mirra's own sworn averments to the following effect (R. 6-7):

"7. I hereby aver that I do not now have and I have never had any recollection of having thrown a chair as stated in the record of my trial; or of the happenings or of anything going on around me or of my own state of mind or awareness of anything from the time of my cross examination when the Prosecutor asked me something about a crime for which I had been previously convicted until the Chief Marshal whose name I believe was Foley later told me in the 'Bullpen' that a nurse had given me a pill. The remainder of that whole day of June 4, 1962 is very vague in my memory. The following day is clearer but still vague in my memory.

"8 • • • I distinctly recall also that over a period of many days and perhaps some weeks previous to my taking the stand I had been having constant headaches and nervous tensions and had been feeling quarrelsome."

The concluding averments in the affidavit of Jerome Lewis, Mirra's attorney in this §2255 proceeding, summarize as follows the grounds for granting a §2255 hearing (R. 54-55):

> "* * * (1) That Mirra at the operative times herein was a Sociopathic Personality with propensity to psychotic episodes in which he would be incompetent to stand trial; (2) that he suffered at least one such episode during the 1962 trial, namely, the chair-throwing incident of June 4, 1962 and its aftermath; (3) that if a psychiatric examination had been granted as requested in connection with the episode of June 4, 1962, the proper medical conclusion would or realistically could have been that he was incompetent to stand trial; (4) that there is enough in the 1961 and 1962 trial records and in these motion papers to indicate at least prima facie that even without the information which would have been available if such contemporaneous psychological examination had been conducted, a hearing should now be held under §2255 to determine whether Mirra was mentally competent to stand trial, and such hearing should result in a determination of non-competency with consequential findings or rulings vacating the sentence as illegal or unconstitutional or both; (5) that in any event such hearing should now be held to determine whether a contemporaneous psychiatric examination should have been granted, and the determination on this question in such hearing should be in the affirmative; and (6) also in any event, a hearing should now be held under §2255 upon our contention that the refusal to grant a contemporaneous psychiatric examination resulted in the lodging in the record of an irretrievable, fatally prejudicial denial of Mirra's constitutional due proc-

ess right to a fair trial in which he had the right not to be tried if he was mentally incompetent to stand trial."

Except as to the issues of (1) disqualification of the 1962 trial Judge for the purposes of the §2255 motion, and (2) alleged waiver of the 1962 contentions of mental incompetence though failure to raise those contentions in the direct review proceedings from the 1962 conviction—both of which latter issues are taken up separately *infra* — the above concludes our description of the showing made before the District Court on Mirra's behalf in support of the §2255 motion (for the entirety of the record references as to that showing, see R. 1-56, 76-110).

The Government's showing in the District Court in opposition to the §2255 motion was based solely on the 1962 narcotics trial record, the respective records (and briefs) in the direct appeal and certiorari-petition proceedings for review of the 1962 conviction, and records of related proceedings in which Mirra was prosecuted for contempt of court arising out of the 1962 trial and for assault arising out of the chair-throwing incident in that trial—in other words, the Government (as we earlier indicated) adduced nothing other than the records of prior court proceedings to controvert our averments, and it is to be particularly emphasized that the Government did not present any controverting affidavit or testimony of a medical nature. For the entirety of the Government's showing in the District Court in opposition to this §2255 motion see R. 111-180, and the Exhibit mentioned in our footnote at pp. 5-6, *supra*, entitled "Government's Appendix, *United States* v. *Anthony Mirra*, 66 Civ. 83".* The record items

* As stated in the footnote at pp. 5-6, *supra*, the abovementioned Government's Exhibit in the District Court is unavailable for filing by us but may be filed by the Solicitor General if he wishes to do so.

just cited reveal that the Government's showing in opposition to the §2255 motion amounted, essentially, to contentions that (1) the trial Judge was justified, on the basis of the trial record and his own observations and evaluations, in concluding that Mirra had faked all of the psychological symptoms or psychological difficulties on which this §2255 proceeding is based; and (2) that Mirra had waived the within §2255 issues—*viz.*, mental incompetence during the above described June 4-5, 1962 stages of the trial and constitutional aggrievement through denial of a contemporaneous psychiatric examination—by failing or deliberately choosing to "by-pass" those issues in the direct appeal and certiorari-petition proceedings for review of the 1962 narcotics conviction (*ibid.*).

The second of these contentions of the Government—waiver—needs to be further noted because both of the Courts below accepted this contention as correct and as being in itself sufficient to justify denial of the §2255 motion without a hearing. While in Mirra's appeal to the United States Court of Appeals for the Second Circuit from the narcotics conviction, his attorney Mr. Luney did argue the issue of whether Mirra had had a fair trial in view of the disruption of the court proceedings by the conduct of other defendants and of Mirra himself, and while Mr. Luney there recited the facts of Mirra's post-verdict *voir dire* proceeding on the issue of the effects of the sedative medication, he did not raise any appellate issue as such as to the denial of the requests for a psychiatric examination in connection with the chair-throwing incident or, apparently, as to Judge MacMahon's ruling on the post-verdict *voir dire* concerning the sedative medication. The Court of Appeals in affirming the narcotics conviction did not refer to any aspect of the question of Mirra's mental competency (*United States* v. *Bentvena*, 319 F. 2d 916 (C. A. 2 1963)). Nor was any issue, or any factual re-

cital, presented on Mirra's behalf in his papers on petition for certiorari to review the affirmance of the narcotics conviction, either on the subject of the denial of psychiatric examination or on the effect of the sedative medication.

The Government contended below that the foregoing facts effected a waiver of Mirra's within §2255 contentions; and that Mirra's good faith (and timeliness) in bringing this §2255 motion were further negated by (1) the fact that the issue of his mental competency in connection with the chair-throwing incident and of the denial of a contemporaneous psychiatric examination had been raised on his behalf in the appeal from his contempt conviction based on that incident (*United States* v. *William Bentvena, et al.*, 304 F. 2d 883 (C. A. 2 1962)); (2) the fact that in the contempt proceeding before Judge MacMahon Mirra had apologized for throwing the chair and had described himself as "a hothead"; (3) that in a separate prosecution for assault based on the chair-throwing incident, where Mirra pleaded guilty, he stated to the sentencing Judge that he was pleading guilty because in fact he was guilty, and he made no claim of non-recollection or mental incompetence (R. 187-189, 223-224n.).

The District Court, in denying the §2255 motion without a hearing (R. 181-224*), held that the §2255 proceeding was barred because the issues sought to be raised could have been raised in the direct appeal from Mirra's 1962 narcotics conspiracy conviction, and that no sufficient cause was shown that would justify the failure to have done so,

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* This refers to the written opinion of the District Court, nine copies of which are filed herewith in lieu of printing the same (see our accompanying motion for permission to dispense with printing this item).

hence this §2255 proceeding was an impermissible attempt to by-pass the regular avenues of direct review (R. 185-189). In any event, the District Court held, the §2255 motion was unmeritorious on its face and should be denied without a hearing because "Petitioner's papers do not raise the issue of mental incompetency to stand trial because the allegations of the facts are patently false, incredible unreliable or irrelevant" (R. 203); and "We conclude that the files and records of this case show beyond doubt that there is no basis for relief on the grounds urged by petitioner" (R. 212). As previously indicated, this latter conclusion of the District Court was dispositively based on the Court's own evaluation of Mirra's conduct during the trial, *i.e.*, it was not based on medical evidence.

The Court of Appeals, in affirming the District Court's order, arrived at substantially the same conclusions of waiver and patent insufficiency of Mirra's §2255 allegations (Appendix A hereto, *infra*).

The facts and the issues as to disqualification of the trial Judge for the purposes of the §2255 motion are further discussed under our "Reasons", *infra*.

Reasons for Granting the Writ

1. Petitioner Mirra has been denied a §2255 hearing on what amounts to a *factual* conclusion by the District Court that Mirra is a liar and a faker. See R. 189-211, where the District Court set forth its reasons for so believing. The Court of Appeals has declined to disturb these findings. (Appendix A hereto, *infra*).

But when everything adduced by both of the Courts below has been considered, the fact still emerges that the District Court has made a *factual* determination, on sharply contested issues of *fact*, and that the District Court has done this without holding an evidentiary hearing.

We do not think that this is a proper way of administering the pre-evidentiary-hearing discretion of the Court in a §2255 proceeding. The procedure seems especially wrong in this instance, because of the understandable heatedness which has so long attended the "Bentvena" narcotics conspiracy case of 1962,* and particularly in the light of the issues posed by Mirra's requests for disqualification of the sentencing Judge (*infra*). Consideration should be given to the facts—as implemented in detail in our moving papers herein in the District Court (see pp. 7-34, *supra*, and "Reason" No. 3, *infra*)—that the very District Judge who was asked to ponder whether he could objectively evaluate Mirra's §2255 contentions, has evidently felt it appropriate to make a determination of a pronouncedly subjective "value judgment" character entailing in the most direct and immediate ways an evaluation of the movant's downright truthfulness and sincerity.

We respect, unreservedly, the sincerity of the District Court in its attitudes about this case. But we respectfully question the objective capacity of the District Court to deal judicially with this particular situation. The result has been, we fear, that the District Court, apparently without realizing it, has treated as issues of "fact" what are really issues of non-objective "opinion" on the part of the Court.

And this has happened, in the present case, with respect to a type of §2255 contention which raises a classically compelling occasion for exercise of the utmost judicial care and considerateness in passing upon the prisoner's §2255 prayers—a prisoner's claim that he was mentally disabled during his criminal trial and was not afforded a fair due process determination of the issue of his mental condition.

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* The lurid reputation of the case is depicted in the opinion of the Court of Appeals herein (Appendix A hereto, *infra*).

It is hardly necessary to cite authority for the proposition that 28 U.S.C. §2255 is available to a Federal prisoner for collateral attack against the constitutionality of his sentence on the ground that he was not mentally competent during his trial or a portion thereof. *E.g., Sanders* v. *United States,* 373 U. S. 1.

A plain infringement of Mirra's constitutional and statutory (18 U.S.C. §4244) rights became lodged in the record of this case when, notwithstanding the earnest and repeated and factually circumstantial representations of Mirra's Court-assigned counsel at the trial that Mirra was in a state of mental incompetence, the trial Judge nevertheless took it upon himself solely on the basis of his own observations as a layman to deny counsel's requests for a psychiatric examination. The law is settled that such a request on behalf of a defendant, made in good faith and not frivolous, is required to be granted. The leading case is *Wear* v. *United States,* 218 F. 2d 24 (C. A. D. C. 1954).

In *Catalano* v. *United States,* 298 F. 2d 616, 617 n. (C. A. 2 1962), the Court specifically noted that §2255 would appear to be available "for inquiry into a temporary incapacity without residual effect"*—citing *Johnston* v. *United States,* 292 F. 2d 51 (C. A. 10 1961).

The situation which was presented to the trial Judge at the time of Mirra's troubles in June 1962—his astounding outburst of violence in the Courtroom, his aftermath condition, the representations of his trial counsel that it was impossible to communicate verbally with him and that he appeared to be asleep or in a stupor (R. 29-47)—was illustrative of the type of situation envisaged in *Dusky* v. *United States,* 362 U. S. 402, where, adopting the Solicitor

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* The precise situation herein involved.

General's phraseology, the Court stated that to support a finding of mental competency "the District Judge 'did need more information than this record presents'. * * *".

Of particular interest—with reference to the fact that the trial Court in Mirra's 1962 trial saw fit to pronounce Mirra mentally competent on the basis of the Court's own observations—is *Roe* v. *United States*, 325 F. 2d 556, 558 (C. A. 8 1963), where the Court said:

> "Standing alone, the court's personal observations at the time of plea or trial cannot make unnecessary a hearing for a determination of mental competency when that issue is properly raised. Hayes v. United States, (C. A. 8th 1962), 305 F. 2d 540, 543; Taylor v. United States, supra, 282 F. 2d [16, 22 (C. A. 8 1960)]. * * *"

This Court should intercede to preserve §2255 as an effective instrumentality of post-conviction constitutional justice, and to vindicate the requirement of that statute that an evidentiary hearing must be granted unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief".

2. A perhaps even more important certiorari issue (affecting the fair and rational administration of the §2255 post-conviction remedy) is presented by the rulings below that petitioner Mirra is excluded from the benefits of the statute by failure to have urged his §2255 issues in the prior direct review proceedings.

Apparently this Court has never announced a rule of general decision that a §2255 movant raising fundamental constitutional objections which were available to be raised in direct review proceedings, is precluded for failure to raise the objections there. At its best, the law on this sub-

ject is unclear. See the exhaustive discussion by Judge Friendly, writing for the Court, in *United States* v. *Sobell*, 314 F. 2d 314, 322-323 (C. A. 2 1963), where the Court examined the conflicting and unclear status of the law throughout the country on the question of a §2255 applicant's preclusion for failure to raise his §2255 points in direct review proceedings, and where the Court stated (with some qualification, it is true) that the §2255 applicant "should have relief * * * if he has shown * * * a significant denial of a constitutional right, even though he could have raised the point on appeal and there was no sufficient reason for not doing so [citing authorities]" (314 F. 2d at 323).

The Court below in its opinion herein did not cite the *Sobell* decision, *supra*, but instead it cited other Court of Appeals cases which have taken a more simplistic view of the problem (Appendix A hereto, *infra*, at p. 10a).

In our presentation on Mirra's behalf in the Courts below we had thought that the *Sobell* decision, *supra*, governed our situation, the more so because the "significant denial of a constitutional right" which we were claiming in Mirra's case fell within one of the prime classic categories of §2255 collateral relief, to wit, a defendant's claim of mental incompetence during his trial.

In view of the status of the law as portrayed in *Sobell*—the picture apparently not having been further clarified by this Court since *Sobell* was written in 1963—it seems unjust that a Federal prisoner (a layman) should be disadvantaged under §2255 for failure to exhaust an appellate avenue when the matter had been in the hands of capable appellate counsel who preceded the §2255 counsel in this case. Although the Courts below imply that Mirra acted in a crafty design to spring an eventual §2255 trap for the Government by withholding his fire in the direct re-

view proceedings, there is not an iota of proof in this record to justify any such insinuation or charge. What the record does show, simply, is that Mirra's attorney in the direct review proceedings did not raise the present §2255 issues even though it also appears that the latter attorney was familiar with those issues. *Cf. Henry* v. *Mississippi*, 379 U. S. 443, 451:

> "'* * * trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims * * *.'"

3. The threshold issue in the proceedings below was disqualification of the trial Judge. The disposition of this issue, in both of the Courts below, was virtually perfunctory: (a) On the motion to disqualify for "bias and prejuduce" (28 U.S.C. §144),* the District Court stated that nothing in the record "suggests a personal bias or prejudice" (R. 217). The Court of Appeals evidently agreed and likewise emphasized the "personal" standard of the statute (Appendix A hereto, *infra*, at p. —). If 28 U.S.C. §144 is available only when this "personal" test is met, then in a case of the present type one must fall back on the due process clause itself for one's guarantee of a "fair and impartial tribunal". The better test, the due process test, should be whether the trial Judge's actions here "exhibit a bent of mind fatal to impartiality of judgment" (*Rosen* v. *Sugarman*, 357 F. 2d 794, 798 (C. A. 2 1966)); see the description of the trial Judge's conduct in relation to Mirra at the 1962 trial as quoted from counsel's affidavit, pp. 8-23, *supra*, where *ipso facto* exactly such a "bent of mind" is displayed. (b) We are respectfully convinced that our alternative request for disqualification, the

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* The affidavit of bias and prejudice appears at R. 66-75.

motion under 28 U.S.C. §455 (Judge as "material witness"), was not seriously disputable. The reasoning of both of the Courts below on this point (Appendix A hereto, *infra*, at p. 12a; R. 212-214) was merely that §2255 is best administered by the Judge who conducted the trial; and the District Court reasoned also that 28 U.S.C. §455 is not applicable in any event at the pre-evidentiary stage of a §2255 proceeding when the only issue is whether the movant is entitled to an evidentiary hearing (R. 124). We presented in our §455 motion papers (R. 57-65, 108) a picture of the situation which seems to us to have depicted unanswerably that the Judge must be a "material witness" in the §2255 proceedings. We pointed out that, unless the Government were to deem the Judge's observations and conclusions non-probative, the Government must unavoidably call the Judge as a witness; and that, if the Government did not do so, we would call the Judge as a witness. The theory that it would be bad to disrupt the work of the Federal District Courts in §2255 proceedings by disqualifying the very Judge who knows the facts of the case proves too much. If this rationale were adopted in the seemingly unqualified manner in which the Courts below have formulated it, the disqualification provision of §455 could *never* operate in *any* §2255 proceeding, and §455 would *pro tanto* be reduced to a nullity, it would *pro tanto* be wiped from the United States Code. The reasoning of both of the Courts below fails to take into account at all, it does not refer at all to, the specific factual problem of "material witness" which is posed by the facts of our particular case. The Courts' rationale is wholly silent on what we think is the only operative, indeed the dispositive, facet of the situation, namely, that in denying Mirra's request for psychiatric examination in the 1962 trial and in determining then and there that Mirra was not authentically suffering from any disabling psy-

chological disturbance, the trial Judge declaredly relied upon his own on-the-spot observations of Mirra plus his (the Judge's) own acknowledged apperceptions induced by the Judge's antecedent experiences in that trial and his knowledge of the record of a prior trial, in both of which trials there had been a great deal of trouble with unruly and obstructive conduct by various defendants.* We emphasize that this last is the operative or dispositive feature in the denial of Mirra's 1962 requests for a psychiatric examination, because in having itself made such personal observations and apperceptions the express basis for *both the 1962 rulings and the rulings on the within §2255 motion with its accompanying requests for disqualification*, the District Court has revealed in the clearest way that what it did in 1962 partook not merely of judicial "finding" or "decision" in the ordinary course of a trial, but it partook also of a distinct form of *testimonial* functioning by the Court. Even if the Court's functioning in 1962 may be said to be assimilable into ordinary judicial as distinct from testimonial functioning *as of that time*, the case becomes quite otherwise when one looks to what the situation must perforce be in the §2255 proceeding which we have thus far unavailingly tried to bring to an evidentiary hearing. Does the District Court mean that, in the event of an evidentiary §2255 hearing in this case, the Court would not be a witness? Does the Court mean that, in such an evidentiary hearing, the Court's 1962 observations and apperceptions would somehow be given probative or some other kind of decisional weight without the Court's having to take the stand, or without its 1962 remarks and determinations being even so much as "judicially noticed" (a form of *testimony*)? How, pro-

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* These apperceptions on the part of the District Court are vividly delineated in its opinion herein at R. 189-212.

cedurally, would the Court's 1962 observations, etc., be fittted into such an evidentiary hearing? The mind reels at the intricate problems of evidence and procedure which appear to be projected by the rationale of the District Court in support of its conclusion that it would not be a "material witness" in a §2255 evidentiary hearing in this case. As regards the District Court's "literal reading" of §455 to show that "disqualification is required only if the Court *is* (or has been) a material witness, and at this stage of this application no one is *a material witness*" (R. 214), we submit as follows: A Judge who is going to be a material witness in a §2255 proceeding, especially in the peculiarly personalized factual circumstances here presented, should not sit in that proceeding for any purpose, including the decision of preliminary questions of law such as the question of whether a case is made out for an evidentiary hearing. This would appear to be the meaning of the words of 28 U.S.C. §455 that a Judge who is a material witness ought not "to sit on the trial, appeal, or other proceeding therein". While there appear to have been two reported decisions to the effect that the statute (28 U.S.C. §455) does not prevent a disqualified Judge from sitting with respect to preliminary orders, those decisions were rendered at a time when the statute provided only that a Judge challenged thereunder might not "sit on the trial", *i.e.*, this was prior to the addition of the statutory language "or other proceedings therein"; furthermore the two decisions to which we refer (cited *infra*) dealt with preliminary matters of a merely formal kind, in no way resembling the critical and dispositive kind of question involved in a determination of whether a §2255 motion presents a case for an evidentiary hearing; the two cases referred to are *In Re Fox West Coast Theatres*, 25 F. Supp. 250, 258 (S. D. Cal. 1936), affirmed 88 F. 2d 212, cert. denied

301 U. S. 710, reh. denied 304 U. S. 772; *Borough of Hasbrouck Heights, N. J.* v. *Agrios*, 10 F. Supp. 371, 374 (D. N. J. 1935). It is noteworthy also that where the disqualification asserted under 28 U.S.C. §455 refers to a case in which the Judge "has a substantial interest, has been of counsel, [or] is or has been a material witness", as distinct from merely a case where the Judge is alleged to be "so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit", the Judge's measure of discretionary choice as to whether or not to disqualify himself is not left merely to the Judge's own personal opinion or merely to his own "conscience and judgment", but in such former cases it would appear to be the Judge's *duty* to disqualify himself. *Ex parte N. K. Fairbank Co.*, 194 Fed. 978, 987-990 (M. D. Ala. 1912). The important problems of federal judicial administration (not confined to the criminal field by any means) which are presented by the foregoing call for exercise of the *certiorari* power.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

JEROME LEWIS,
ABRAHAM GLASSER,
Attorneys for Petitioner
Anthony Mirra.

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 364—September Term, 1966.

(Argued March 9, 1967 . Decided June 27, 1967.)

Docket No. 30795

ANTHONY MIRRA,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and SMITH, *Circuit Judges.*

Appeal from orders denying without hearing motion under 28 U.S.C. §2255 to vacate sentence and motion to disqualify judge in the 28 U.S.C. §2255 proceeding, in the

Appendix A

United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*. Affirmed.

JEROME LEWIS, Brooklyn, New York, *for petitioner-appellant.*

MICHAEL W. MITCHELL, Asst. U. S. Attorney, Southern District of New York (Robert M. Morgenthau, United States Attorney and Otto G. Obermaier, Asst. U. S. Attorney, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge*:

Anthony Mirra, confined under a 20-year sentence after trial to the jury on a charge of narcotics conspiracy, judgment affirmed in *United States* v. *Bentvena*, 319 F. 2d 916 (2d Cir.), cert. denied 375 U. S. 940 (1963), moved under 28 U.S.C. §2255 to vacate the sentence on the ground that on an occasion during the trial Mirra had been mentally incompetent to understand the proceedings against him and to assist counsel in his own defense. He also moved in the §2255 proceeding to disqualify the trial judge, Hon. Lloyd F. MacMahon. The motions were denied without hearing and Mirra appeals. We find no error in either ruling and affirm the judgment.

The incident on which Mirra's claims are based occurred during his second trial. The history of the proceedings up to that point may be culled from reports of the various appeals to date. During the first trial, before Levet, *J.* and a jury, Judge Levet found it necessary to remand the defendants. This court affirmed the order, describing the circumstances as follows, 288 F. 2d 442, 445-6 (2d Cir. 1960):

Appendix A

"We also hold that under all the circumstances of the case, especially a succession of misadventures which have already caused numerous delays and adjournments in the presentation of the evidence, the order of the trial judge was a proper exercise of discretion for the purpose of ensuring the orderly completion of the trial.

"From its inception the trial has been bedeviled by frequent delays. Commenced on November 21 rather than November 14 because of the disappearance of a defendant (Angelo Tuminaro) still a fugitive, it was thereafter impeded by apparent illness, accident and other misfortune.

"John Ormento became ill Tuesday, December 6. The trial halted at 2:30 in the afternoon and did not resume until Friday, December 9. On Wednesday, December 14, David Petillo found himself unwell and was thereupon transferred to Bellevue where a preliminary diagnosis of cardiac insufficiency was made. After hearing conflicting medical testimony, the trial judge granted a further adjournment. Tests subsequently established that Petillo was not suffering from heart disease.

"The trial was then scheduled to resume Thursday, December 22. On that day, after a motion for mistrial (grounded on prejudice to all the defendants by the prior delays) had been denied, it was found impossible to continue because one of the defendants (Sancinella) was not present. The defaulter appeared that evening and was remanded. On Tuesday, December 27, the court was informed that counsel for Sancinella was suffering from an in-

capacitating illness. Sancinella was thereupon directed to retain new counsel, or accept court-appointed counsel, and to familiarize said counsel with the facts of the case. Because of this and the death of a juror's brother, the trial was then adjourned to January 3, 1961. On January 3, Sancinella indicated an inability to procure other counsel; the court therefore assigned him Albert Krieger, Esq., counsel for the defendant Gellman. Sancinella refused, however, to accept or confer with any counsel other than the still incapacitated attorney who had represented him at the outset. In consequence, the trial judge granted Sancinella a mistrial and severance.

"Reports that William Bentvena was ill forced suspension of proceedings on Friday, January 13.

"On Wednesday, January 25, the court was informed that the defendant, Struzzieri, had been injured in an automobile accident which had occurred at about 3:30 A.M. that morning. Investigation by the government revealed that the car with which Struzzieri had collided was driven by one Franzione, a man possessed of an extensive criminal record and despite his denials, apparently well acquainted with Struzzieri. On January 27, the physician in charge of Struzzieri at Queens General Hospital informed the court that Struzzieri could be discharged from the hospital the following day. Disagreement as to the possibility that Struzzieri might be suffering from a subdural hematoma, resulted in extended hearings at which medical testimony was presented by a court-appointed neurosurgeon, a resident at the hospital, and a neurologist retained by Struz-

zieri. The defendant's neurologist testified that Struzzieri's condition demanded a diagnosis of 'subdural suspect'; he urged a spinal tap to clarify the matter. The court-appointed physician thereupon re-examined the patient and reported that he was convinced beyond a reasonable doubt that Struzzieri did not have a subdural hematoma, was malingering, and was able to stand trial. Struzzieri subsequently refused to permit a spinal tap.

"To the date of remand there had been precisely 25 Trial days; 6 in November, 6½ in December, 12½ in January. The government had not yet finished putting in its case.

"At the trial's commencement on November 21, the court selected four alternate jurors. By January 30 two jurors had been excused leaving only two alternates for further emergencies, little enough insurance for a long trial in the middle of a severe winter.

"Before remanding appellants, the trial judge, out of the presence of the jury, considered the substantial facts in the development of the case and concluded:

> 'I am unable to discriminate between the defendants. I realize that counsel may be to some extent inconvenienced. However, in order to assure the presence of the defendants at the trial I am, I believe, after balancing the situation, constrained to * * * direct the remand of all defendants now on bail.' Record 5822-23.

"The court then undertook to make arrangements so that counsel might suitably confer with their clients."

Later in the first trial, Mirra refused to obey an order of the court to be quiet and sit down, which resulted in a 20-day contempt sentence following mistrial in the case, affirmed sub nom. *United States* v. *Galante,* 298 F. 2d 72 (2d Cir. 1962).

In the second trial before Judge MacMahon and a jury, defendants were again remanded by order affirmed *United States* v. *DiPietro,* 302 F. 2d 612 (2d Cir. 1962). Thereafter, the incident on which the present proceeding is based resulted in another contempt sentence for Mirra, affirmed *per curiam* 304 F. 2d 883 (2d Cir.), cert. denied 371 U. S. 927 (1962). The narcotics conviction of Mirra in the principal case was affirmed, 319 F. 2d 916 (2d Cir.), cert. denied 375 U. S. 940. This court's opinion briefly reviewed some of the trial incidents. 319 F. 2d 916 at 929-30:

"The first trial of this indictment began on November 21, 1960, after a number of delays, including a one-week postponement occasioned by the flight of the defendant Tuminaro on the eve of trial. It proceeded along its rock road for six months over every conceivable type of obstruction and interruption. On May 15, 1961, the eve of summations, it ground to a halt after the foreman of the jury broke his back in an unexplained fall down a flight of stairs in an abandoned building in the middle of the night. No alternate jurors (four had been originally empanelled) remained and a mistrial was declared. As this court has already had occasion to consider the misadventures in the first trial and the misconduct of the defendants which resulted in their remand

and in contempt actions against some of them, they will not be fully catalogued here.

"At the conclusion of the first trial, the defendants were enlarged on bail and, with the court's permission, various attorneys from the first trial were discharged from their representations. The case appeared at regular monthly intervals on the trial calendar beginning June 19, 1961. On each occasion it was adjourned because a number of the defendants said that they had been unable to retain counsel notwithstanding their ability to raise substantial bail. As early as July 31, 1961, Judge Murphy sensed 'that the failure to retain counsel was part of a plan to postpone trial.' Despite efforts of the court and threats of contempt proceedings, it was not until March 9, 1962, that all defendants who had not been severed on the government's motion had counsel, either retained or appointed by the court. After further delays and substitutions of counsel (to be treated more fully below), the trial began on April 2.

"During the polling of jurors in this opening day of trial, the first outburst by Salvatore Panico occurred. This incident was a precursor of events to come. Similar outbursts by Panico and other defendants became commonplace. On one occasion Panico climbed into the jury box, walked along the inside of the rail from one end of the box to the other, pushing the jurors in the front row and screaming vilifications at them, the judge, and the other defendants. On another occasion, while the defendant Mirra was being cross-examined by the Assistant United States Attorney, Mirra picked up the

witness chair and hurled it at the Assistant. The chair narrowly missed its target but struck the jury box and shattered. The trial judge responded to these outbursts by having the perpetrators gagged and shackled. We have described only two of the more dramatic disturbances which plagued the trial of this case for we find it neither necessary nor judicious to publicize or preserve the vile language and rebellious conduct that characterized this trial. Suffice it to say that more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive."

The appellant claimed that he was incompetent when he threw the witness chair at the prosecutor June 4, 1962 while under cross-examination regarding a prior narcotics conviction, and that the condition persisted after receiving some pills on the following day. He claimed that refusal of a requested psychiatric examination on June 4 and continuation of the trial on those two days was a denial of the process. Appellant offered in support an affidavit of a psychiatrist to the effect that the only way a competent opinion could be formed as to Mirra's mental condition on June 4 was by prompt examination at the time. Judge MacMahon denied the motion to vacate on two grounds, waived by deliberate failure to press the claims on direct appeal, and because "the application, files and records of the case alone" conclusively showed that his claims have no merit.

The record shows that Mirra's outburst on June 4 came at a critical point in his cross-examination. He had denied on the stand any previous involvement in narcotics traffic and any acquaintance with most of his co-defendants, whom

he had characterized as "junk pushers" and "dope pushers." Government counsel then questioned him as to a conviction in 1958 and asked him to refresh his recollection from a government exhibit as to the charge on which he had been convicted. Mirra responded with the recitation of the statutory citation, Title 18, Sections 173 and 174, twice repeating this after having his attention called to the language of a portion of the exhibit. Thereupon the exhibit was placed in evidence and when government counsel read from it "conspiracy to violate the United States Narcotics Laws," Mirra threw the chair. Seized by the marshals, Mirra said, "All right, I won't fight. All right, I won't fight." Mirra was led out and a recess was taken. During the recess his counsel reported that he had tried to consult with him and couldn't get through to him, and made the request for his commitment for examination by a qualified psychiatrist. When Mirra was brought back into the courtroom, the Court ordered him put back in his chair, shackled and gagged. Mirra asked, "Why are you going to gag me for?" When brought up for sentencing June 26, 1962, on contempt charges for the chair incident and other incidents during the trial, on being asked by the Court whether he had anything to say in his own behalf, Mirra answered, "Nothing much, your Honor, except that I am a lothead, period," and later, "Well, I am sorry for the chair incident, your Honor. The other things I didn't realize were contemptible. I just was shooting off my mouth. I didn't realize that was contempt."

It is Mirra's claim that he has no memory of June 4 after counsel asked him of the earlier conviction and that while his memory is clearer as to the events of the next day, it is still hazy. (Opinion of Dr. Helfand, pp. 11 and 12 of the record on this appeal.) Mirra's court-appointed trial coun-

sel was apparently convinced that there was genuine difficulty in communicating with Mirra during the two day period.

The point, however, was bypassed on direct appeal, and is not now available. It is by no means newly discovered, for it was argued on the appeal from his contempt conviction that the trial court should have conducted an inquiry into his mental condition at the time the chair was thrown. He cannot raise what is essentially the same argument now. *United States* v. *Re,* slip opinion 1141, 1148 (2d Cir., Feb. 6, 1967) (Waterman, *J.*, concurring), citing *United States* v. *Marchese,* 341 F. 2d 782, 789 (9th Cir.), cert. denied 382 U. S. 817 (1965); *Matysek* v. *United States,* 339 F. 2d 389, 391 (9th Cir. 1964), cert. denied 381 U. S. 914 (1965); *Stein* v. *United States,* 313 F. 2d 518, 522 (9th Cir. 1962), cert. denied 373 U. S. 918 (1963); *United States* v. *Jenkins,* 281 F. 2d 193 (3rd Cir. 1960).

Even if we were to reach the question, moreover, we would find no error in the determination of the §2255 motion. It is obvious from the record that the trial court, from his observation of Mirra during the trial and the history of the prior proceedings, concluded that Mirra was shamming and deceiving his counsel as part of a concerted effort to disrupt the proceedings and cause a mistrial. Indeed, the carefully worded affidavit of the psychiatrist does not claim that he has an opinion that Mirra's mental health was impaired at the time of the chair throwing, but asserts that it could then have been tested. In these circumstances we cannot say that the judgment of the Court, based on his own observations, Mirra's reactions and statements, constituted error depriving Mirra of a fair trial. Here the judge had observed Mirra for months, no claim of a history of mental illness or other cause for the chair throwing was

asserted, Mirra's conduct prior thereto and thereafter was not irrational, and his own later statements indicated that he did know what was going on and ascribed his own actions solely to hot-headedness.

Even if he were having difficulty following this short segment of a long trial, the witnesses heard were two women called by other defendants impeaching a Canadian witness at the former trial whose testimony was read in this trial, on matters as to which it is not claimed that Mirra had any knowledge, and no issue was raised on direct appeal of any bolstering of their testimony by questioning of those witnesses which would have been suggested to counsel by Mirra had he not been, as he claims, in a "fog." Compare *Kyle* v. *United States*, 266 F. 2d 670, 672 (2d Cir.), cert. denied 361 U. S. 870 (1959); *Sanders* v. *United States*, 23[illegible] F. 2d 127 (4th Cir.), cert. denied 351 U. S. 955 (1956); *United States* v. *Walker*, 197 F. 2d 287 (2d Cir. 1952).

On a §2255 motion, the judge must determine whether a hearing is required. Here the judge had available the record of the trial and of his own observations. The matter which appellant contends required a hearing consists of the affidavit of Dr. Helfand. Assuming the truth of this document, however, there is no basis for a hearing on incompetence at trial on June 4 and 5, 1962. It merely raises a possibility that a psychiatrist examining Mirra at the time, told he'd twice banged his head in his youth, was once rejected for wartime maritime service for emotional instability and was later accepted by the army, had taken the actions he had in court in both trials, would have formed an opinion at variance with the opinion of the judge, that Mirra was shamming. This falls short, it seems to us, of sufficient showing to require a hearing. There is no claim that an examination now could in fact determine what Mir-

ra's condition was on June 4 and 5. The issue was tried then and determined against him, and nothing material is added to the record of that trial. We are not required, on any such showing, to find error in determining on the record, that there was no error requiring relief under §2255 in the determination of the trial judge that the episode was deliberate obstruction, not calling for delay in the trial for a hearing.

We find no error on the alternate ground, the ruling on the motion to disqualify.

Any opinions formed for or against a party by reason of the evidence and observed conduct before a judge in a judicial proceeding, and the judge's expressions of such opinions, however vigorous, are not the personal "bias and prejudice" required to disqualify a judge under the statute. *Foster* v. *Medina,* 170 F. 2d 632 (2d Cir. 1948), cert. denied 335 U. S. 909 (1949).

And the fact that personal observations by the judge on trial necessarily enter into his rulings is not cause for disqualification. Indeed, one of the purposes of §2255 was to make use of such knowledge of the trial occurrences in passing on attacks on convictions because of such occurrences. *United States* v. *Smith,* 337 F. 2d 49, 53 (4th Cir. 1964), cert. denied 381 U. S. 916 (1965).

We find no error in the refusal of Judge MacMahon to disqualify himself from hearing the §2255 motion. There is no showing of any personal animus of the judge toward this litigant. Orders affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of June, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
Circuit Judges.

ANTHONY MIRRA,
Movant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Statutes Involved

[28 U.S.C.] "§ 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

Appendix C

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139 § 114, 63 Stat. 105."

[28 U.S.C.] "§ 144. BIAS OR PREJUDICE OF JUDGE

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that is made in good faith. June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, §65, 63 Stat. 99."

Appendix C

[28 U.S.C.] "§ 455. INTEREST OF JUSTICE OR JUDGE

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. June 25, 1948, c. 646, 62 Stat. 908."

[18 U.S.C.] "§ 4244. MENTAL INCOMPETENCY AFTER ARREST AND BEFORE TRIAL

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which

evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 724

ANTHONY MIRRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 379 F.2d 782. The opinion of the district court is reported at 255 F.Supp. 570.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1967. By order of Mr. Justice Harlan, the time for filing a petition for a writ of certiorari was extended to and including October 13, 1967, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's motion to vacate sentence, based upon a ground urged at trial but abandoned upon appeal, was properly denied without a hearing.

2. Whether the judge who presided at petitioner's trial properly refused to disqualify himself from ruling on the motion to vacate sentence.

STATEMENT

After a trial in the United States District Court for the Southern District of New York, petitioner was convicted of narcotics violations, and was sentenced on July 10, 1962, to imprisonment for twenty years. His conviction was affirmed. *United States* v. *Bentvena*, 319 F.2d 916 (C.A. 2), certiorari denied, *sub nom. Ormento* v. *United States*, 375 U.S. 940. A conviction for contempt based on his conduct at the trial (including the act of throwing a chair at the prosecutor) was also upheld. 304 F.2d 883, certiorari denied, 371 U.S. 927. On January 12, 1966, petitioner moved to vacate his sentence, alleging that for two days during the trial, June 4th and 5th, he had been mentally incompetent to assist in his own defense and that he had been unconstitutionally denied his request for a psychiatric examination at that time (R. 1-55).[1]

[1] "R." refers to the record filed by petitioner, "G.A." to the government appendix in the court below, lodged by the government.

Petitioner also filed a motion to disqualify the trial judge from considering the motion to vacate sentence, alleging that the judge was of necessity a material witness and that the judge had previously shown an intense personal bias and prejudice against petitioner (R. 57-64). In a detailed opinion the district court denied the motions without a hearing. The court of appeals affirmed.

At the trial petitioner testified in his own behalf, contradicting in detail the testimony of a government witness (G.A. 2-31). On June 4th, during cross-examination, he gave an indefinite answer to a question about a prior conviction. When the Assistant United States Attorney commenced reading from the record of the conviction, petitioner threw the witness chair at the attorney, narrowly missing him (G.A. 52-55).

Following a recess, petitioner's trial counsel reported that petitioner complained of being sick and that he was incoherently repeating, "They are trying to murder me." Counsel stated that he could not communicate with his client and asked the court to commit petitioner to a hospital for psychiatric examination. The court denied the request (G.A. 57-58). Following a stipulation as to the earlier sentence, government counsel stated he had no further cross-examination and petitioner's counsel asked for and was granted leave to defer re-direct examination (G.A. 58-59). Some days later petitioner testified extensively on redirect (G.A. 92-105).

On June 4, subsequent to the chair-throwing incident and after a defense witness had testified, petitioner's counsel reported that he had been unable to

consult with petitioner who appeared to be asleep during the noon-hour. Later, after counsel was directed to consult with petitioner outside the courtroom, counsel reported that at the noon recess the nurse had given petitioner two pills which contained phenobarbital (G.A. 63-65). On the following day, June 5, the court stated that after the trial was completed it would hear testimony as to the medication which petitioner had received (G.A. 77). Counsel reported that petitioner had told him to inform the court that he had received three pills that morning and that he was in a fog (G.A. 82).

At a hearing conducted after the trial, the nurse in the first-aid room testified that on June 4 she had given petitioner two pills containing one-half grain of phenobarbital (G.A. 115). A physician testified that one-half grain of phenobarbital would not interfere with a person's ability to understand testimony or the nature of the proceedings at trial (G.A. 117-118, 123). He stated that the drug is used to lessen nervous irritability (G.A. 121) and that the normal dose to induce sleep is a grain and a half, although more might be necessary for a very nervous person (G.A. 119). Petitioner testified that the nurse gave him the pills when he complained about not feeling well. He said he began to get sleepy about a half hour after he received the pills and remained sleepy "[f]or a few hours, a couple of hours" (G.A. 123-125).

Following the trial, at the sentencing on the contempt proceeding, petitioner said he was a hothead and was sorry for the chair-throwing incident (G.A. 113). At sentencing on the main charge, petitioner again said

that he was sorry about his conduct during the trial and again blamed it on being hot-headed (G.A. 127). When he pleaded guilty to a charge of assault based on the chair-throwing incident he acknowledged that he had discussed the incident with his attorney and had given him all the facts (G.A. 134-135). He again apologized for his conduct (G.A. 144).

2. Petitioner's motion to vacate sentence was based on affidavits submitted by petitioner himself, by his present attorney, and by Dr. Max Helfand, a psychiatrist.

Petitioner stated in his affidavit (R. 6-7):

> I hereby aver that I do not now have and I have never had any recollection of having thrown a chair as stated in the record of my trial; or of the happenings or of anything going on around me or of my own state of mind or awareness of anything from the time of my cross-examination when the Prosecutor asked me something about a crime for which I had been previously convicted until the Chief Marshal whose name I believe was Foley later told me in the "Bullpen" that a nurse had given me a pill. The remainder of that whole day of June 4, 1962 is very vague in my memory. The following day is clearer but still vague in my memory.[2]

He further stated that for a considerable period before June 4 he had been having constant headaches and was tense and quarrelsome; that he had had two

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[2] These assertions were repeated in substance by petitioner in his affidavit supporting the motion to disqualify the judge (R. 69).

accidents causing injuries to his head when he was a child; and that he had been rejected as emotionally unstable by the Merchant Marine in 1944, but accepted for service by the Army in October 1954 (R. 7-8).

Dr. Helfand, who based his opinion on the trial transcript covering petitioner's testimony, the post-trial testimony concerning medication received by petitioner, the prison medical records, and conferences with petitioner's present counsel (R. 10-11), stated that his conclusion was that, on June 4, 1962, and immediately thereafter, petitioner, as a sociopathic personality "might have been subject to outbursts of temporary psychotic episodes which would be or might be characterized by extreme hostility and outbursts of sadistic behavior." He further concluded that, without a full psychiatric examination at the time, "no legally proper conclusion from a sound medical standpoint could be made as to Mirra's fitness to stand trial" and that had there been an examination at the time the conclusion of the examiner might well have been that petitioner was not mentally fit to stand trial (R. 11-12).

ARGUMENT

Petitioner's motion was properly denied without a hearing. There is nothing in petitioner's moving papers to indicate, even *prima facie*, that petitioner was actually incompetent during the two days in question. The trial record shows that during that period he was able to consult with counsel and that both before and after the period in question he was able to testify

rationally. The psychiatric opinion offered was only that a prompt psychiatric examination on the days in question might have shown that petitioner was then incompetent. The psychiatrist had not talked with petitioner's trial counsel and had apparently assumed the truth of petitioner's statement that he had no recollection of the chair-throwing incident. That petitioner did actually have a recollection of that incident shortly after its occurence is shown by his own statements at the sentencings on the main charge, the contempt and the assault. Even assuming that petitioner was drowsy during the period that testimony was given by two witnesses for the defense (contrary to the conclusion of the trial judge which was based on his own observation of petitioner at trial), this hardly amounts to mental incompetence. Nor can there be any claim that the drowsiness deprived petitioner of the ability to defend himself against the charges for which he was on trial; the witnesses who testified during the period in question were friendly to the defense and gave testimony which did not involve petitioner. In these circumstances, the courts below properly held that petitioner had made no showing which would present a basis for collateral attack on a judgment which had been fully reviewed on appeal.

2. The court properly overruled the motion to disqualify the trial judge on the grounds that he would necessarily be a witness on the motion and that he was biased and prejudiced. Since there were no allegations requiring a hearing, there would be no occa-

sion for the judge to be a witness.[3] The mere possibility that a judge might be called as a witness is insufficient to disqualify him. *United States* v. *Hughes*, 325 F.2d 789, 793 (C.A. 2), certiorari denied, 377 U.S. 907.

The charge of bias and prejudice is unsupported. On direct appeal, the court of appeals considered in detail the incidents relied upon to show that the judge's attitude prejudiced the jury and found an absence of personal hostility toward the defendants and that the court's rulings were reasonable. *United States* v. *Bentvena*, 319 F.2d at 932-933, certiorari denied, 375 U.S. 940. The court concluded (p. 933):

> We have described sufficiently the outrageous conduct of the defendants at this trial. We find that the trial judge, notwithstanding this harassment, maintained an impartial attitude and did all in his power to safeguard the rights of the defendants and to minimize the effects of these outbursts.

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[3] One of the purposes of the statute was to relieve judges having no antecedent knowledge of the case from the onerous task of delving into an unfamiliar record. *United States* v. *Hayman*, 342 U.S. 205; *United States* v. *Smith*, 337 F.2d 49, 53 (C.A. 4), certiorari denied, 381 U.S. 916.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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